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Percy Wooden was convicted of assault with an intent, and he appeals. Reversed and remanded.

*Hugh A. White*, of Lexington, for appellant.

*Jno. Garland Pollard*, *Atty. Gen.*, and *C. B. Garnett*, *Asst. Atty. Gen.*, for the Commonwealth.

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NORFOLK & W. RY. CO. *v.* A. J. STEELE & SON.

Sept. 9, 1915.

[86 S. E. 124.]

**1. Appeal and Error (§ 1047\*)—Harmless Error—Summons Duces Tecum.**—Any error in not quashing summons, issued at plaintiffs' instance, under Code 1904, § 3371, as to production of a writing in the adversary's possession, was harmless; defendant not only relying on, and insisting that plaintiffs were bound by the data given in its answer to the summons, but introducing witnesses to prove the same facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.\* 1 Va.-W. Va. Enc. Dig. 547.]

**2. Carriers (§ 211\*)—Live Stock Shipment—Time of Confinement—Extension—Written Request.**—An indorsement in the handwriting of one of the firm of shippers in the blank margin of the bill of lading satisfies the proviso of Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. 1913, §§ 8651-8654), that time of confinement of a shipment of live stock without unloading for rest and food, fixed at 28 hours, may be extended to 36 hours on the written request of the owner, "separate and apart from any printed bill of lading or other railroad form."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.\* 2 Va.-W. Va. Enc. Dig. 692.]

**3. Carriers (§ 218\*)—Limiting Liability—Agreed Value.**—The provision in a contract of shipment of cattle that the carrier assumes liability to the extent only of the agreed valuation does not protect it against all liability, if the cattle sell in the market for as much as the agreed valuation, notwithstanding damage from injury or delay; but the shipper can recover any damage, not exceeding the valuation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\* 2 Va.-W. Va. Enc. Dig. 692.]

**4. Carriers (§ 218\*)—Contracts—Exempting from Liability.**—Provision in a contract of shipment of cattle for acceptance by the shipper as full compensation for damage from any unusual delay, whether or not caused by the carrier's negligence of the amount of

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

extra expense for feed, is unreasonable on its face, and illegal, as exempting the carrier from liability for its negligence, and not merely limiting liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\* 2 Va.-W. Va. Enc. Dig. 692.]

**5. Carriers (§ 218\*—Limiting Liability—Approval by Interstate Commerce Commission.**—A carrier's interstate contract of live stock shipment, in terms limiting liability, in consideration of being based on the lower rate, not being referred to in, or made a part of its tariffs, and not appearing to have been passed on by the Interstate Commerce Commission, will not avail it; it having the burden of showing its validity by approval by the Commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\* 2 Va.-W. Va. Enc. Dig. 692.]

**6. Carriers (§ 228\*)—Delay in Transportation—Evidence—Similar Matters.**—As tending to meet a carrier's defense that delay in transportation was unavoidable, and due to destruction of a bridge, evidence of a like shipment from the same point, to the same destination, by the same route, made the following day, and arriving a day earlier, is proper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.\* 2 Va.-W. Va. Enc. Dig. 692.]

**7. Appeal and Error (§ 1053\*)—Harmless Error—Admission and Exclusion of Evidence.**—Any error in admission of evidence was rendered harmless by an instruction equivalent to a positive exclusion of it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.\* 1 Va.-W. Va. Enc. Dig. 547.]

**8. Carriers (§ 219\*)—Freight—Notice of Damage—Interstate Shipment—Connecting Carriers.**—Under the Carmack amendment (Act June 29, 1906, c. 3591, §.7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. 1913, § 8592]), making the initial carrier the agent of all the carriers on the entire route, notice of claim of damage under an interstate shipment, given to the initial carrier, is enough, even if the contract is susceptible of interpretation as requiring it to be given directly to the connecting carrier, on whose line loss occurs.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. § 219.\* 7 Va.-W. Va. Enc. Dig. 871.]

Error to Circuit Court, Tazewell County.

Action by A. J. Steele & Son against the Norfolk & Western Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

*Henry & Graham & Hawthorne*, of Tazewell, for plaintiff in error.

*Greever & Gillespie* and *Harman & Pobst*, all of Tazewell, for defendants in error.

NORFOLK & W. RY. CO. *v.* WARDEN.

Sept. 9, 1915.

[86 S. E. 103.]

**1. Carriers (§ 380\*)—Ejection of Passengers—Issues, Proof, and Variance.**—The variance between a declaration, alleging that plaintiff, while intoxicated, boarded a train as a passenger, and that after the train started the trainmen, knowing his condition, ejected him and threw him to the ground, dislocating one of his hips, leaving him in a dangerous place, and the proof, failing to show that he was thrown from the train and thereby injured, but merely showing that he was negligently left in an unsafe place, and as a proximate result wandered in the dark until he fell from a trestle and sustained the injuries complained of, was material, and a motion to exclude the testimony as to the danger of the place should have been sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1464-1466, 1469, 1470, 1472; Dec. Dig. § 380.\* 2 Va.-W. Va. Enc. Dig. 711.]

**2. Trial (§ 412\*)—Motion to Exclude Evidence—Demurrer to Evidence—Waiver of Objection to Evidence.**—A defendant, who demurred to the evidence after the overruling of his motion to exclude it because not admissible under the declaration, did not thereby waive the objection to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 182, 974-977; Dec. Dig. § 412.\* 4 Va.-W. Va. Enc. Dig. 517.]

**3. Appeal and Error (§ 1178\*)—Decision—Reversal.**—Where the variance between the declaration and the proof was material, and the court overruled a motion to exclude the evidence, and overruled a demurrer to the evidence, subsequently interposed, the court on writ of error will reverse the judgment for plaintiff and remand the case, to afford him an opportunity to amend the declaration to conform to the proof, as authorized by Code 1904, § 3384.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.\* 13 Va.-W. Va. Enc. Dig. 484.]

**4. Damages (§ 59\*)—Mitigation—Intoxication.**—That a person sustaining a personal injury was intoxicated at the time cannot be invoked in mitigation of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 108-112, 114, 117, 118; Dec. Dig. § 59.\* 4 Va.-W. Va. Enc. Dig. 410.]

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.